APPENDIX

APPENDIX A

Unreported Opinion of the Jackson County (Missouri) Circuit Court

Circuit Court
Sixteenth Judicial Circuit of Missouri
Division One
Court House, Kansas City 64106

William J. Marsh, Judge

January 15, 1981

Thomas B. Sullivan III
Crown Center, Suite 672
2400 Pershing Road
Kansas City, Missouri 64108

Michael W. Manners &
Robert J. Graeff
311 West Kansas
Independence, Missouri 64050

Gentlemen:

Enclosed is a self-explanatory copy of the Order and Judgment entered in this cause this day. The parties and their attorneys should understand that this result is based solely upon what I view the evidence in the case and the applicable law require and not in any way upon my opinion as to the constitutionality or unconstitutionality of Sec. 290.140, V.A.M.S., as evidenced by the overruling of defendant's motions on the latter ground.

Very truly yours,

/s/ William J. Marsh
William J. Marsh

IN THE
CIRCUIT COURT OF JACKSON COUNTY,
MISSOURI

Case No. CV77-0874
Civil Docket "H"
Division 1

HAROLD W. ALDERSON,
Plaintiff,

vs.

CLARK OIL & REFINING CORPORATION,
Defendant.

ORDER AND JUDGMENT

Now on this day defendant's motion for a Judgment Notwithstanding the Verdict or in the Alternative For a New Trial having come on for hearing and argument January 9, 1981, the parties appearing therefor by their respective attorneys and the Court having heard the arguments of both parties and having considered their briefs in support thereof and in opposition thereto and having taken the matter under advisement and now being fully advised in the premises now finds that, considering all of the evidence in the light most favorable to the plaintiff, there was evidence upon which the jury could find that defendant's service letter did not truly state all the reasons or causes of plaintiff's termination and could have found that he was terminated because he retained some of defendant's money for safekeeping purposes in violation of defendant's instructions and damaged defendant's safe by drilling out the lock and by having a serious dispute or series of disputes with one of defendant's supervisors and, further, could have found that the service letter defendant sent in response to plaintiff's request both incorrectly stated the date that an audit was conducted and the dollar

amount of shortage an audit taken on a date other than as set forth in defendant's service letter; the Court is of the further opinion that there was no evidence upon which the jury could have found defendant had an ulterior motive, that the purported reasons defendant stated in its service letter were other than mistakes of fact or that defendant's conduct in writing its service letter in the manner in which it did was either willful, wanton or malicious, that is, intentionally wrongfully written without just cause or excuse and that, therefore, there was insufficient evidence in this case to submit the issue of punitive damages, and that, therefore, the Court erred in submitting such issue and the jury's verdict, therefore and judgment thereon is and was erroneous and, as stated, not supported by competent and substantial evidence.

Accordingly, defendant's Motion Not Withstanding the Verdict should be and the same is hereby sustained and defendant's Alternative Motion for New Trial solely on the issue of punitive damages should be and the same is hereby sustained and, further, the Court is of the opinion that defendant's motions in all other respects should be and the same are hereby overruled.

WHEREFORE IT IS ORDERED AND ADJUDGED that the verdict and judgment in favor of the plaintiff and against the defendant for the sum of $100,000.00 as punitive damages, only, be and the same is hereby vacated, set aside and for naught held, that if the judgment is hereafter vacated or reversed, defendant be and hereby is granted a new trial on the issue of punitive damages for the reason that there was insufficient evidence in this case to make a submissible case thereon, as alleged in paragraph 9 of defendant's Alternative Motion.

Accordingly it is ordered and adjudged and decreed that plaintiff Harold W. Alderson have and recover of

defendant Clark Oil & Refining Corporation the sum of One Dollar as actual damages and his costs herein expended and have execution therefor.

/s/ WJM
Judge

January 15, 1981

APPENDIX B

Unreported Order by Missouri Supreme Court Denying Petitioner's Application to Transfer Appeal

No. 64178

IN THE SUPREME COURT OF MISSOURI

WD Nos. 32436 & 32471

May Session 1982

Harold Alderson,
Appellant,

vs. TRANSFER

Clark Oil & Refining Corp., et al.,
Respondents.

Now at this day, on consideration of Respondents' Application to transfer the above entitled cause from the Western District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

Gunn, J., not participating.

STATE OF MISSOURI—SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session thereof, 1982, and on the 13th day of September 1982, in the above entitled cause.

APPENDIX C

Opinion of the Missouri Court of Appeals, Western District, Officially Reported at 637 S.W.2d 84

Harold ALDERSON, Appellant,

v.

CLARK OIL & REFINING CORPORATION, et al., Respondents.

Nos. WD 32436, 32471.

Missouri Court of Appeals,
Western District.

May 4, 1982.

Motion for Rehearing and/or Transfer to Supreme Court Overruled and Denied June 23, 1982.

Application to Transfer Denied

Sept. 13, 1982.

Before CLARK, P. J., and MANFORD and KENNEDY, JJ.

KENNEDY, Judge.

Appellant Alderson, plaintiff below, appeals from a judgment setting aside a jury award of punitive damages in the amount of $100,000 and granting judgment in favor of defendant Clark Oil & Refining Company on the punitive damages issue. He appeals also from the trial court's conditional grant of a new trial on the punitive damages issue, in the event of reversal on appeal of the judgment N.O.V. in Clark's favor. A judgment for plaintiff for $1.00

actual damages, based upon the jury's verdict, was left intact.

Clark cross-appeals the judgment for plaintiff for actual damages in the amount of $1.00, alleging the constitutional invalidity of the service-letter statute, § 290.140, RSMo 1978.

Clark's allegation that the service-letter statute, § 290.140, RSMo 1978, is unconstitutional raises the threshold question of our jurisdiction. Missouri Constitution, Article V, § 3. All the constitutional arguments advanced in Clark's brief have been considered by our Supreme Court (since Clark's brief was filed) and rejected. *Hanch v. KFC National Management Corp.*, 615 S.W.2d 28 (Mo. banc 1981); *Accord: Rimmer v. Colt Industries Operating Corp.*, 656 F.2d 323 (8th Cir. 1981). Clark acknowledges in oral argument here that the statute's constitutionality is not now a viable issue. In such circumstances, the allegation of the statute's unconstituionality does not deprive us of jurisdiction. *Swift & Co. v. Doe*, 311 S.W.2d 15, 20-21[2] (Mo.1958); *City of Marshfield, ex rel. Hasten v. Brown*, 337 Mo. 1136, 88 S.W.2d 339, 340-341 (1935); *Renfrow v. Gojohn*, 600 S.W.2d 77, 79[3] (Mo.App.1980).

An earlier trial of the case resulted in a verdict for plaintiff of actual damages of $1.00 and $150,000 punitive damages.

The trial court after the first trial reduced the punitive damages to $100,000, the amount sought in the petition, then granted defendant's motion for a new trial when plaintiff refused to remit an additional $40,000. The second trial resulted in the verdict and judgment now under review.

Submissible issue of punitive damages.

The first question is the sufficiency of the evidence to make a submissible case on the issue of punitive damages. We hold there was sufficient evidence to make a prima facie case on that issue. The trial court erred in granting judgment N.C.V. for defendant Clark on that issue.

The facts as disclosed by the evidence are as follows:

Plaintiff Alderson had been employed with defendant Clark Oil & Refining Company since July, 1975. In May, 1976, he was promoted to service station manager and had continued to manage a Clark station until his discharge December 7, 1976. His immediate supervisor was the retail sales representative, Charles Palmquist. Palmquist was in turn supervised by the district sales manager, David DeNeff.

On December 7, 1976, in the late afternoon, plaintiff on his way home after leaving work stopped at another Clark station to see one Bob Thompson, the manager of the other station. There plaintiff met Charles Palmquist, his supervisor, introduced above. Palmquist suggested that the three of them go out for a drink. Thompson declined, but plaintiff and Palmquist left for a nearby lounge. They tarried there for what was apparently several hours. During the course of the evening, Palmquist repeatedly asked plaintiff his opinion of Bob Thompson's potential for advancement. Plaintiff eventually voiced his lack of confidence in Thompson's ability because of shortages at his station. This statement apparently angered Palmquist who stated that plaintiff was probably the one whose station was short. Plaintiff offered him the keys to his station and invited Palmquist to conduct an immediate audit. Palmquist declined. There was evidence from which the

jury could have found that Palmquist then discharged plaintiff from his employment.

After the two had parted company, plaintiff returned to his station. Palmquist had preceded him. Palmquist appeared to be intoxicated. Alderson summoned the police who asked Palmquist to leave, and Palmquist did so. Alderson then drilled open the safe because the safe had been tampered with and could not be opened with the keys. He removed upwards of $1,400 in cash. There is no claim that Alderson was exceeding his authority in doing this. He explained at the trial that he feared that Palmquist would fabricate a shortage of cash and that was his reason for taking the cash into his possession.

Plaintiff did not return to work after this time.

The next morning plaintiff met Palmquist at a doughnut shop at Palmquist's request. Palmquist asked plaintiff to forget the incident of the night before, but plaintiff refused.

Later on the same day, December 8, plaintiff received a call from David DeNeff, Palmquist's superior, who asked him to meet with him to discuss the situation. After hearing plaintiff's story, DeNeff indicated he would take action against Palmquist and made arrangements to meet with plaintiff again the next day to deposit the money which plaintiff had removed from the station safe. There was no discussion of shortages at plaintiff's station. DeNeff had never advised plaintiff that Clark was unhappy with his performance as a station manager. DeNeff said to plaintiff that "he would have to fabricate a reason for termination because they were doing it". Plaintiff's testimony indicates he understood that this statement referred to his own termination.

On December 15 Alderson requested a service letter from DeNeff. The letter, signed by DeNeff, stated that Alderson had been employed by Clark from July 2, 1975, until December 17, 1976, when he was terminated due to poor maintenance of the station, untimely filing of master reports and a shortage of $400 uncovered in an audit on December 7, 1976.[1] DeNeff admitted in his testimony on the trial that the date of the termination should have been December 7, 1976, and also admitted that the audit was conducted on the 8th, rather than on the 7th, and was not completed until the 9th. He acknowledged that the alleged shortage was not a reason for the discharge. He claimed that the audit did reveal a shortage of $696.55, a point which was sharply contested upon the trial. Plaintiff testified that he had applied for many jobs since the receipt of the service letter but had not

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1. The letter reads as follows:

December 22, 1976
Mr. Harold Alderson
554 Oxford
Independence, Missouri 64053

Dear Mr. Alderson:

This is in response to your letter of December 15, 1976. Be advised that you were employed by Clark Oil & Refining Corporation as a manager of one of our stations. In such capacity, your responsibilities included the general management of our station located at 202 West 23rd Street, Independence, Missouri. I have enclosed a copy of a job description for a further amplification of your duties as manager. You were employed from July 2, 1975, until December 17, 1976, and the reason you were terminated was that your performance simply was not satisfactory to Clark. That is, the station and its facilities were not maintained to Clark's standards, you did not furnish your Master Reports in a timely fashion to Clark, and on December 7, 1976, an audit uncovered a loss of almost $400.00 at the station you were managing.

Very truly yours,

Clark Oil & Refining Corporation
David W. DeNeff
District Manager

been hired. At the time of trial he was a welfare recipient.

Defendant Clark does not claim here that plaintiff did not make a submissible case for actual damages under the statute. Defendant's claim is that there was no case made out for punitive damages, a claim with which the trial court agreed in setting aside the punitive damages award to the plaintiff and awarding judgment N.O.V. to the defendant on that issue.

In order to make out a claim for punitive damages for the issuance by a defendant of a service letter containing false reasons for the plaintiff's discharge from his employment, plaintiff must show that the false statements of reasons were made with legal malice or with actual malice. This case was submitted upon a hypothesis of legal malice. With respect to legal malice justifying a punitive damages award, our Supreme Court has said, *Herberholt v. dePaul Community Health Center*, 625 S.W. 2d 617, 624 (Mo. banc 1981):

> Nominal damages, properly found, serve as an adequate basis for an award of punitive damages where either actual or legal malice is present. *State ex rel. St. Joseph Belt Railway Company v. Shane*, 341 Mo. 733, 108 S.W.2d 351 (1937), "Legal malice exists where a wrongful act is intentionally done without just cause or excuse; whereas actual malice or express malice exists when one with a sedate, deliberate mind and formed design injures another." *Schmidt v. Central Hardware Co.*, 516 S.W.2d 556 (Mo.App.1974).

To the same effect, see *Labrier v. Anheuser Ford, Inc.*, 621 S.W.2d 51, 58 (Mo. banc 1981).

There was evidence from which the jury could have found as their verdict shows that they did find, that the

reasons for plaintiff's discharge stated in the letter were false, and known by defendant's agent DeNeff to be so when the letter was written. There was evidence that there had never been any complaint from plaintiff's superiors about his maintenance of the station under his management, and never any complaint about the tardiness of his reports. There was evidence, too, that no shortage of $400 had been disclosed at the time of plaintiff's discharge, and that the shortage mentioned in the letter was not the reason for the discharge. Mr. DeNeff acknowledged in his trial testimony, in fact, that the shortage was not a reason for the discharge. There was the further testimony of plaintiff Alderson that Mr. DeNeff had told him on December 9 that "he would have to fabricate a reason for termination because they were doing it".

The evidence outlined in the preceding paragraph if believed by the jury, was sufficient to support a verdict for punitive damages. *Labrier v. Anheuser Ford, Inc.*, supra; *Herberholt v. dePaul Community Health Center*, supra; *Hanch v. KFC National Management Corporation*, supra.

Defendant Clark in its brief underlines testimony which contradicts plaintiff's case. It points to testimony which tends to show that plaintiff voluntarily quit, or offered to do so, on December 7, then on the next day undertook to withdraw his resignation. (The service letter itself contradicts that, however.) Defendant emphasizes the lack of detail in plaintiff's testimony of his discharge by Palmquist, and the lack of detail in his testimony about DeNeff's statement that he would have to fabricate a reason for discharging plaintiff. It points to its audit, made after the assumed December 7 termination date, showing that there was a shortage in the plaintiff's station accounts. Apparently it was this shortage—although unknown to

defendant at the time of the termination—which defendant posited in the service letter as a reason for termination. This is indicated by the fact that Mr. DeNeff sought by his trial testimony to reconcile the $400 figure in the letter with the $696.55 shortage shown in the audit. The audit was sharply contested by plaintiff, who claimed that it was altered by defendant to show a non-existent shortage. All of defendant's arguments, however, go only to credibility and weight of the evidence, a matter for the jury to determine. *Hartley v. Matejka*, 585 S.W.2d 240, 242[10] (Mo.App.1979); *Frisella v. Reserve Life Insurance Co. of Dallas, Tex.*, 583 S.W.2d 728, 734[14] (Mo.App. 1979). Our task upon appeal is at an end when we determine, as we have, that there was substantial evidence supporting the jury's verdict.

Propriety of trial court's conditional order of new trial.

Appellant's next assignment of error is directed at the trial court's conditional order granting the defendant a new trial on the issue of punitive damages, in case the judgment N.O.V. for defendant did not survive appeal.

Appellant's point must be sustained and the order granting a new trial must be set aside. The ground specified by the court for the new trial order was "that there was insufficient evidence to make a submissible case thereon, as alleged in paragraph 9 of defendant's alternative motion". Said paragraph 9 of defendant's motion was directed at the sufficiency of the evidence to make a submissible case on the issue of punitive damages.

The failure to make a submissible case is not grounds for a new trial, but only for a judgment N.O.V. *Smith v. J. J. Newberry Co.*, 395 S.W.2d 472, 474 (Mo.App. 1965). If the trial court grants a motion for a new trial

on that ground, when plaintiff has in fact made a submissible case (as we have held that he did), such order granting a new trial is arbitrary and an abuse of discretion. *Lifritz v. Sears Roebuck & Co.*, 472 S.W.2d 28, 33 (Mo. App.1971).

Propriety of instructions.

Defendant Clark, in defending the court's order granting a new trial, says that there were grounds in its motion for a new trial other than that upon which the trial court based its order, which were meritorious and which required a new trial on the punitive damages issue. *Kuzuf v. Gebhardt*, 602 S.W.2d 446, 451 (Mo. banc. 1980). It complains of two instructions:

It complains of plaintiff's verdict-directing instruction, which required a finding that the service letter did not "correctly state the true cause" of plaintiff's termination. The complaint is of the use of the words "correctly state the true cause" rather than the statutory term "truly state the reason". The instruction as given complies with the prescribed MAI instruction, MAI 23.08. Respondent gives us no authority supporting its position, and advances no reason how the variance in language from statute to instruction was in any way prejudicial.

It complains next of the court's defining "malicious" as legal rather than actual malice, using MAI 16.01. Respondent argues that actual malice should have been required to be found. That argument, though, has already been disposed of supra. *Herberholt v. dePaul Community Health Center*, supra; *Labrier v. Anheuser Ford, Inc.*, supra.

The judgment is reversed and the cause is remanded to the trial court with directions to reinstate the verdict and judgment for the plaintiff.

All concur.

APPENDIX D

Constitutional and Statutory Provisions Involved

Amendment I of the Constitution provides, in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, ..."

Amendment XIV, Section 1, of the Constitution provides in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The essential statutory provision is Section 290.140, Revised Statutes of Missouri (1978), originally enacted by Missouri Laws 1905, p. 178, and reads as follows:

> "Whenever any employee of any corporation doing business in this state shall be discharged or voluntarily quit the service of such corporation, it shall be the duty of the superintendent or manager of said corporation, upon the written request of such employee to him, if such employee shall have been in the service of said corporation for a period of at least ninety days, to issue to such employee a letter, duly signed by such superintendent or manager, setting forth the nature and character of service rendered by such employee to such corporation and the duration thereof, and truly stating for what cause, if any, such

employee has quit such service; and if any such superintendent or manager shall fail or refuse to issue such letter to such employee when so requested by such employee, such superintendent or manager shall be deemed guilty of a misdemeanor, and shall be punished by a fine in any sum not exceeding five hundred dollars, or by imprisonment in the county jail for a period not exceeding one year, or by both such fine and imprisonment."

APPENDIX E

Partial Transcript of Oral Argument by Petitioner's Counsel Before Missouri Court of Appeals

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD-32436
WD-32471

HAROLD W. ALDERSON,
Appellant,

vs.

CLARK OIL & REFINING CORPORATION, et al.,
Respondents.

TRANSCRIPT OF PROCEEDINGS

(Partial)

BE IT REMEMBERED, that on this 15th day of March, 1982, the above-entitled matter being appealed from the Circuit Court of Jackson County, Missouri, held before the Honorable William J. Marsh, came on for hearing before the Honorable Donald B. Clark, Presiding Judge, and the Honorable Donald L. Manford and the Honorable Don W. Kennedy, Judges.

APPEARANCES:

Mr. Michael W. Manners appears for the Appellant, Harold W. Alderson.

Mr. William R. Williams appears for the Respondents, Clark Oil & Refining Corporation, et al.,

(WHEREUPON, the following proceedings were had.)

[2] * * *

JUDGE CLARK: Are you abandoning your contention as to the constitutionality of this case?

MR. WILLIAMS: At this time we do not realistically expect the Court to overrule the Missouri Supreme Court as to the constitutionality.

JUDGE CLARK: There is a question as to whether that issue is properly lodged in this court?

MR. WILLIAMS: And we do want to preserve it for possible transfer to the Supreme Court if we were to lose here, but then we are not really urging this Court to do it. However, we feel that the other grounds urged in our respondents' brief as to examining the various instructions, etc., in light of the constitutional challenges, we take that very seriously; and that is, that we feel that if you do reach that point, and we don't feel that you have to, but if you reach the point where you say, well, we are going to reverse Judge Marsh on the judgment and relief on the issue of whether or not a new trial should have been granted, whose very point as far as the instruction particularly in light of the constitutional challenges I don't think have ever been dealt with. Specifically if you deal with the question on whether or not you should correctly state the true reason.

Obviously, the case in '65 dealt with that and said that is sufficient, but I think that has to be reviewed, particularly when you have admitted a mistake in the letter if you get to that question of whether or not there is a new trial in light of the constitutional challenges. I also feel that there is a clear difference between the instructions now given in Federal Court that require actual malice

which at least in Judge Oliver's latest trial took out the use of the word "correctly" and the Missouri Supreme Court decision.

As far as Rimmer, I think Rimmer feels that you very clearly need actual malice to meet constitutional muster, and I would like to argue that I think Missouri Supreme Court has never dealt directly with that issue; that sometimes they have admittedly had language that said, Well, legal is sufficient as well as actual, but I don't think they have dealt with specifically the reason, or at least in the Rimmer opinion, they say the Missouri Court did not clearly articulate it. So I think that should be met only if the Court were to overrule Judge Marsh's judgment, taking away the verdict.

JUDGE CLARK: Thank you, Mr. Williams.

APPENDIX F

Missouri Approved Instructions Given by Respondent Alderson to the Jury in Missouri Circuit Court on the Question of Punitive Damages:

INSTRUCTION NUMBER 7

If you find the issues in favor of Plaintiff, and if you believe the conduct of Defendant as submitted in Instruction Number 5 was willful, wanton, or malicious, then in addition to any damages to which you find Plaintiff entitled under Instruction Number 6, you may award Plaintiff an additional amount as punitive damages in such sums as you believe will serve to punish Defendant and to deter it and others from like conduct.

MAI 10.01, Modified

Submitted by Plaintiff

INSTRUCTION NUMBER 8

The term "malicious" as used in these instructions does not mean hatred, spite, or ill will, as commonly understood, but means a doing of the wrongful act intentionally without just cause or excuse.

MAI 16.01, Modified

Submitted by Plaintiff